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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1456

MATTHEW IANNIELLO,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Matthew Ianniello is seeking a writ of certiorari to review an order of the New York State Court of Appeals, entered February 20, 1975, which unanimously affirmed an order of the New York State Appellate Division, First Department. *People* v. *Ianniello*, 36 N.Y.2d 137, 365 N.Y.S.2d 821 (1975). The order of the Appellate Division, entered January 31, 1974, had unanimously affirmed, without opinion, Ianniello's conviction in the Supreme Court of New York County of three counts of CRIMINAL CONTEMPT (former N.Y. Penal Law §600(6) repealed eff. Sept. 1,

1967). *People* v. *Ianniello*, 43 A.D.2d 908, 352 N.Y.S.2d 882 (1974). Following his conviction, Ianniello had been sentenced, on June 24, 1971, to a suspended, one-year term of imprisonment on one count and a $500 fine on each of the three counts.

Introduction

The Indictment

In an indictment filed February 2, 1965, Ianniello was charged with four counts of criminal contempt, in violation of section 600(6) of the former New York Penal Law, based upon his evasive, equivocal, and false responses to questions asked of him in two appearances, on June 11 and June 18, 1964, before a New York County grand jury. Indictment No. 378-65. That grand jury, the indictment alleged, had been "conducting an investigation to determine whether violations of * * * the Penal Law relating to conspiracy to bribe public officers, bribery of public officers and acceptance of unlawful fees had occurred." The indictment further alleged that Ianniello, after being informed of the nature of the investigation and having been told that the grand jury had voted him transactional immunity, was questioned regarding three alleged occurrences:

(1) Whether during the two week period immediately preceding the defendant's appearance before * * * [the] grand jury on June 18, 1964, [he] had been told and warned to stay away from [a] * * * certain police sergeant because said sergeant was under investigation by the Police Department;

(2) Whether any police officers, other than a certain police captain, had been at the defendant's farm

during the twelve month period immediately preceding his appearance before [the] grand jury on June 18, 1964; and

(3) Whether the defendant in [a certain conversation with a police sergeant] had sought and had obtained confidential information relating to * * * [a] pending police investigation from the aforementioned police sergeant [and] what matters were discussed in a five to ten minute conversation the defendant had with said certain police sergeant.

In response to each question pertaining to the warning to stay away from a police sergeant (paragraph (1) *supra*), Ianniello, it was charged, gave virtually the same answers, namely: "I don't recall," "I don't remember," "I can't deny * * * or affirm," "I don't recall the incident." In response to each question relating to the police officers' visits to his farm (paragraph (2) *supra*), Ianniello was alleged to have also given virtually the same answers: "I don't recall," "I don't remember," "I can't deny something I don't recall * * * I can't admit something I don't recall." Finally, in response to each question about his receipt of confidential information from a police sergeant (paragraph (3) *supra*), he again was alleged to have given virtually the same answers: "I don't remember the conversation," "I don't recall."

The proceedings culminating in *People* v. *Ianniello*, 21 N.Y.2d 418, 288 N.Y.S.2d 462 (1968)

In October 1965, Ianniello moved to dismiss the indictment, and the motion was denied. Subsequently, Ianniello moved for reargument of his motion to dismiss alleging,

inter alia, that the testimony which constituted the basis of the indictment was obtained in violation of his right to counsel and his privilege against self-incrimination. On June 22, 1966, the court granted reargument and dismissed the indictment, basing its decision solely upon Ianniello's right-to-counsel contention.

The People appealed from the order of dismissal, and the Appellate Division, First Department, noting that immunity had not been conferred upon Ianniello according to the procedure required by statute, held that the charge of contempt was therefore improperly laid against him and affirmed the order without reaching the right-to-counsel issue. *People* v. *Ianniello*, 27 A.D.2d 504, 280 N.Y.S.2d 852 (1967). On February 21, 1968, the Court of Appeals unanimously reversed the order of the Appellate Division and reinstated Ianniello's indictment. *People* v. *Ianniello*, 21 N.Y.2d 418, 288 N.Y.S.2d 462 (1968). Ianniello petitioned this Court for a writ of certiorari, and the petition was denied. *Ianniello* v. *New York*, 393 U.S. 827 (1968).

The proceedings culminating in Ianniello's conviction and the instant petition

Subsequently, Ianniello was tried upon the reinstated indictment and was convicted by a jury of three counts of criminal contempt. He received $500 fines with respect to each count and a suspended, one-year sentence with respect to one count. He appealed unsuccessfully to the Appellate Division and then to the Court of Appeals.

Ianniello asks this Court to grant a writ of certiorari to review the latest decision of the Court of Appeals. He

argues that the trial court improperly denied him a suppression hearing to determine whether his indictment resulted from evidence acquired by illegal eavesdropping. In addition, he contends that the prosecutor denied him due process during the grand jury proceedings, that he was deprived of a fair trial, and that the prosecutor's summation was prejudicial. The Court of Appeals, in sustaining Ianniello's conviction, rejected these claims without comment.

POINT I

Ianniello contends that the trial court erroneously denied his post-trial motion for a hearing to determine whether the questions asked of him before the grand jury were the fruits of illegal wiretapping. However, he does not demonstrate that the decision below, with respect to this contention, rested upon federal grounds. He has thus failed to show that this Court has jurisdiction to review the state court decision, and his petition should be denied. In any event, Ianniello's contention under federal law does not warrant review by this Court.

A. Ianniello has failed to establish this Court's jurisdiction.

One who petitions this Court to review the judgment of a state court must establish that the Court has jurisdiction to do so. *Durley* v. *Mayo*, 351 U.S. 277, 281-82 (1956); *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952); *Memphis Natural Gas* v. *Beeler*, 315 U.S. 649, 651 (1942); *Klinger* v. *Missouri*, 13 Wall. 257, 263 (1871). Ianniello states that he seeks to invoke the jurisdiction vested in this Court by

28 U.S.C. §1257(3) (62 Stat. 929).* Petition at 2. Under this provision, Ianniello is required to demonstrate that the state court judgment which he asks this Court to review rested upon federal grounds. *See, e.g., Durley* v. *Mayo, supra.* To give effect to this requirement, the rules of this Court provide that one who petitions the Court for certiorari must state "the way in which [the federal questions] were passed upon by the [state] court * * *." Supreme Court Rules, rule 23(1) (c), 398 U.S. 1035.

Ianniello has not, and can not, satisfy this requirement because there is no indication that the state appellate courts, in fact, dealt with Ianniello's federal claim. Two months after his April 1971 trial, Ianniello appeared for sentencing and, for the first time, requested a hearing to determine whether the grand jury questions which he had evasively answered had been the tainted fruits of illegal eavesdropping (A 459-66).**† That application was denied

* §1257(3) provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

** Numerical references preceded by "A" refer to the pages of the Appellant's Appendix filed in the Court of Appeals by Ianniello.

† At sentencing defense counsel, Maurice Edelbaum, Esq., who was also the attorney of record on appeal, couched his motion for a hearing in terms of a "renew[al]" (A 459), of a previous application, and in his brief to the Appellate Division counsel claimed that the issue of alleged taint was raised "immediately before trial." Appellant's Brief filed in Appellate Division by Ianniello at 7. However, the record shows that no such application was ever made prior to the

(footnote continued on next page)

(A 471). On appeal to the Appellate Division and subsequently to the Court of Appeals, Ianniello argued, as he does to this Court, that the trial court improperly denied his motion. He suggested that such a hearing might have revealed that evidence introduced against him at trial had been erroneously admitted in view of this Court's decision in *Lee* v. *Florida*, 392 U.S. 378 (1968). (*Lee* extended to state prosecutions the rule that evidence obtained in violation of section 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. §605, amended eff. June 19, 1968 [hereinafter cited as §605], is inadmissible at trial.) He further asserted that such a hearing might have demonstrated that his conduct in the grand jury had been justified because the questions asked there were based on illegal wiretapping. He relied upon *Gelbard* v. *United States*, 408 U.S. 41 (1972), which held that section 2515 of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 19, 18 U.S.C. §2510 *et seq.* [hereinafter cited as Safe Streets Act], provided a defense to grand jury witnesses who refused to answer questions on the ground that the questions were based on evidence obtained in violation of the Act. Appellate Division brief at 5-13; Court of Appeals brief at 13-24; Petition at 10-19.

The People, however, did not respond to these arguments but instead urged that they be ignored because

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sentencing proceeding. In fact, prior to trial, Mr. Edelbaum himself expressly advised the trial judge "so that we don't confuse this argument, I am not urging that we are entitled to look at the transcripts of the wiretaps for the purpose that we should claim that the information they [the prosecutor and police] got led to this indictment * * *. [It] makes no difference how the information was obtained" (A 132). The assertion that the issue was raised before the sentencing proceeding was not renewed in the Court of Appeals. Appellant's Brief filed in Court of Appeals by Ianniello at 24. Nor is that assertion made to this Court. Petition for Certiorari at 18-19.

Ianniello had not properly preserved them for appellate review in accord with applicable state law. The Appellate Division affirmed Ianniello's conviction without opinion. *People* v. *Ianniello*, 43 A.D.2d 908, 357 N.Y.S.2d 882 (1974). Subsequently, the Court of Appeals rejected Ianniello's claim in this regard without comment and affirmed the judgment of the Appellate Division. *People* v. *Ianniello*, 36 N.Y.2d 137, 365 N.Y.S.2d 821 (1975). In addition, the remittitur of the Court of Appeals is silent with respect to the grounds upon which its decision rested. Appendix A to the Petition. And Ianniello, who is represented by two able and experienced attorneys, did not request the Court of Appeals to amend its remittitur so as to indicate the basis of the court's decision, a common practice in New York. *See, e.g., People* v. *Schwartzman*, 24 N.Y.2d 241, 299 N.Y.S.2d 817, *remittitur amended*, 24 N.Y.2d 914, 301 N.Y.S. 2d 644, *cert. denied*, 396 U.S. 846 (1969); *see also* Wolfson and Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 HARV. L. REV. 111, 112 (1949). In such circumstances, this Court has held that it has no jurisdiction if "it appears that the judgment [of the state court] *might* have rested upon a non-federal ground * * *." *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952) (emphasis in original).

Moreover, the Court of Appeals most likely did not reach the merits of Ianniello's claim but, rather, rejected it on the basis of the independent and adequate state ground urged by the People. In response to Ianniello's claim, the People, relying upon state law recently enunciated in the decisions of the state's highest court, argued that Ianniello was foreclosed from raising this issue on appeal because he had not made his claim before the entry of the

jury's verdict. Respondent's brief in the Court of Appeals at 6-10. The People urged the Court of Appeals to ignore Ianniello's arguments on the merits of his claim. Apparently the Court of Appeals did just that. It stated that only another issue, not raised here, "merit[ed] discussion." *People* v. *Ianniello*, 36 N.Y.2d 137, 140, 365 N.Y.S.2d 821 (1975).

The People's argument focused upon Ianniello's failure at trial to challenge the source of the questions asked of him before the grand jury, either by objecting to their admission into evidence or by seeking to justify his conduct on the ground that the questions were derived from illegally obtained information. The People relied upon *People* v. *St. John*, 33 N.Y.2d 914, 353 N.Y.S.2d 628 (1973), a case which involved a situation nearly identical to that of *Ianniello*. In *St. John*, the defendant was subpoenaed to testify before a grand jury and granted immunity. He then refused to answer virtually all questions put to him, asserting that his refusals to answer were justified by his fifth amendment privilege against self-incrimination. St. John was subsequently convicted of criminal contempt on April 7, 1971. Then, at his sentencing proceeding on August 21, 1971, his attorney, for the first time, raised the claim that the questions asked of St. John in the grand jury were based upon electronic surveillance. The trial court refused to direct the prosecutor to divulge whether eavesdropping had been employed and imposed sentence. St. John contended on appeal, as did Ianniello, that the denial of a hearing on that issue was erroneous inasmuch as, under the rule announced in *Gelbard* v. *United States*, 408 U.S. 41 (1972), the existence of illegal eavesdropping would have provided him with a defense to his contempt

prosecution. The People, as in Iannello's case, did not address the merits of St. John's claims but, rather, argued that St. John was foreclosed from raising the issue of possible electronic surveillance because he had failed to assert that claim prior to the entry of the jury's verdict. Respondent's brief (*St. John*) at 9-13. The Court of Appeals, without opinion, affirmed St. John's judgment of conviction.

Manifestly, *St. John* was dispositive of Ianniello's contentions. Moreover, the procedural argument presented by the People in *Ianniello* was even stronger than in *St. John*. For Ianniello, unlike St. John, had repeatedly acknowledged his awareness that his grand jury questions were based on eavesdropping. Thus, during the grand jury proceedings, and in response to a question pertaining to a confidential conversation, Ianniello remarked, "Every day there are confidential things happening, phones are being tapped, listening devices in the office are installed" (A 62-63). Additionally, prior to the commencement of trial, Ianniello's attorney echoed his client's earlier comment and pointed out to the court that "it [was counsel's] information that the defendant's telephone had been tapped and a bug was in his office and that there was information adduced from these wiretaps" (A 132). Then, at sentencing, counsel explained that Ianniello, during his appearance before the grand jury, had sought to be excused "to go out to speak to his attorney * * * to find out from his lawyer, can they tap my wire, get information and then ask me questions about [it]" (A 465-66). Finally, in his brief to the Appellate Division, Ianniello's attorney again stated his personal conclusion that "the internal contents of the conversation [about which Ianniello had been ques-

tioned in the grand jury] could only have been discerned by electronic listening devices." Appellate Division brief at 7.

Furthermore, *Lee* v. *Florida*, 392 U.S. 378 (1968), relied upon by Ianniello for the proposition that "evidence derived from such interceptions [of telephone conversations in violation of §605] is not admissible in evidence in a State court trial" (Petition at 11), and *Fuller* v. *Alaska*, 393 U.S. 80 (1968) (*per curiam*), relied upon to support the applicability of *Lee* to Ianniello's trial, had both been decided long before the trial. Nevertheless, neither before nor during the trial did Ianniello attempt to defend his conduct in the grand jury on the ground that the questions put to him were derived from illegal wiretapping. And, despite the fact that he had obtained copies of the minutes of the relevant grand jury proceedings years before the trial (A469), and thus was given ample opportunity to search the prosecutors' questions for hints of tainted derivation, Ianniello did not object to the admission of those minutes into evidence at trial on that ground. Ianniello did not complain until the time of his sentencing.*

The strong procedural argument advanced by the People below presented the Court of Appeals with an inde-

* In the instant petition, as before the Court of Appeals, Ianniello attempts to explain his failure to complain earlier by asserting that "[a]t the outset of trial counsel recognized that the New York Court of Appeals' decision in *People* v. *Tomasello*, 21 N.Y.2d 143, 287 N.Y.S.2d 1 [(1967)], precluded the argument that a Grand Jury witness was entitled to challenge the questions put to him as having come from a tainted source * * *." Petition at 18-19; Court of Appeals brief at 23. This explanation misstates the holding in *Tomasello*. That case held that one who testifies before a grand jury and thereby obtains immunity may nonetheless be prosecuted for perjury committed there. *Tomasello*, then, serves neither to explain nor to excuse Ianniello's failure to make his claims much earlier.

pendent and adequate state ground upon which to base its decision. *Henry* v. *Mississippi*, 379 U.S. 443 (1965). Certainly, a state court's insistence upon the enforcement of a procedural rule requiring prompt objections and the timely interposition of alleged defenses, in circumstances such as those present here, serves a legitimate state interest. *See Henry* v. *Mississippi*, 379 U.S. at 447. That interest is the avoidance of unnecessary expenditures of judicial and prosecutorial resources in the trial of cases which, upon the belated objections of the defendant, may subsequently be dismissed. *See, e.g., People* v. *Vidal*, 26 N.Y.2d 249, 254, 309 N.Y.S.2d 336 (1970).

B. Ianniello's contention does not warrant review by this Court.

In *Nardone* v. *United States*, 302 U.S. 379 (1937), this Court interpreted §605 to forbid the use in federal prosecutions of unlawfully intercepted communications.* However, in *Schwartz* v. *Texas*, 344 U.S. 199, 203 (1952), this Court declined to extend the exclusionary rule announced in *Nardone* to state prosecutions. The *Schwartz* decision was still controlling law when, prior to his 1964 grand jury appearances, Ianniello was the subject of court-authorized wiretapping (A 459-60, 468). *Schwartz* still controlled at the time of Ianniello's indictment. However, primarily because of the erroneous dismissal of the indictment and the time-consuming appellate proceedings required to have it reinstated, the trial did not commence until 1971.

* §605, prior to its amendment under §803 of the Safe Streets Act, provided in part:

> [N]o person not being authorized by the sender shall intercept any communication and divulge * * * the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person * * *.

Meanwhile, *Schwartz* was overruled, and the *Nardone* interpretation of §605 was applied to trials in the state courts. *Lee* v. *Florida*, 392 U.S. 378 (1968). Subsequently, in *Fuller* v. *Alaska*, 393 U.S. 80 (1968) (*per curiam*), and *Kaiser* v. *New York*, 394 U.S. 280 (1969), the Court held that the *Lee* decision did not apply to state prosecutions in which both the illegal interception and the trial occurred prior to June 1968. Those decisions did not deal with cases in which, as here, the interception occurred before, but the trial commenced after, that date.

We have found two cases which have discussed the question left open by *Fuller* and *Kaiser*. In both, the courts held that the §605 exclusionary rule did not apply. In *People* v. *Feinlowitz*, 29 N.Y.2d 176, 324 N.Y.S.2d 62 (1971), *cert. denied*, 405 U.S. 963 (1972), the New York Court of Appeals observed that the Safe Streets Act, which provided a set of rules governing court-authorized and court-supervised wiretapping, had become law two days after the *Lee* decision. The court examined Congress' findings, enacted as part of that legislation, and determined that they reflected Congress' recognition of the fact that many states, in reliance upon the *Schwartz* decision, had enacted statutes authorizing court-controlled wiretapping. The Court of Appeals further determined that Congress intended to sanction the prior state practice and also to express disagreement with *Lee* and *Nardone* which had read into §605 an exclusionary rule applicable to criminal prosecutions. 29 N.Y.2d at 185, 324 N.Y.S.2d at 69.* The Court of Appeals concluded that it did not make sense to apply the *Nardone*-

* By §803 of the Safe Streets Act, Congress amended §605 expressly to exclude from its scope court-controlled wiretapping authorized by other provisions of the Act.

Lee interpretation of §605 to a case in which the interception had occurred before *Lee* (*i.e.*, before the exclusionary rule was applicable to the states) and in which the trial had taken place at a time, after the *Lee* decision, when the Safe Streets Act was in effect. *Id.**

In *United States ex rel. Rosner* v. *Warden*, 378 F.Supp. 1064 (S.D.N.Y. 1974), the district court noted that neither *Fuller* nor *Kaiser* dealt with a situation in which the wiretapping occurred before *Lee*. Citing *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the district court held that the application of the §605 exclusionary rule to evidence obtained prior to the *Lee* decision would not serve to deter police misconduct. 378 F.Supp. at 1068.

Both *Feinlowitz* and *Rosner* provide sufficient reasons why *Lee* should not be applied to a case, like Ianniello's, in which the wiretapping was conducted before *Lee* and the trial after. However, even if both those cases were wrongly decided, even if *Lee* does apply to Ianniello's case, he would not be entitled to relief.

One might agree that witnesses [like, for example, those in *Gelbard* v. *United States*, 408 U.S. 41 (1972)], who had in good faith refused to answer questions on the expressly stated ground that the questions were based upon illicitly obtained information, were entitled to defend their silence by proving the impropriety. However, Ianniello did not refuse to answer. Rather, he answered in an "evasive,

* In cases decided after *Feinlowitz*, the New York courts have adopted its holding without further discussion. *See People* v. *Iannaccone*, 29 N.Y.2d 612, 324 N.Y.S.2d 407 (1971); *People* v. *Koutnik*, 44 A.D.2d 48, 49, 353 N.Y.S.2d 197 (1st Dept. 1974); *People* v. *Daria*, 38 A.D.2d 833, 329 N.Y.S.2d 647 (2nd Dept. 1972).

equivocal, and false'' manner. Even if the questions put to him were derived from illegal wiretaps, Ianniello did not have a license to be affirmatively contemptuous. *See Dennis* v. *United States,* 384 U.S. 855, 864-67 (1966); *People* v. *Ianniello,* 21 N.Y.2d 418, 425, 288 N.Y.S.2d 462, 469 (1968).

Finally, the question of *Lee's* applicability to cases such as this is clearly not one of lasting importance. Seven years have passed since this Court's decision in *Lee* and since the enactment of the Safe Streets Act. It is highly unlikely that many cases involving pre-*Lee* wiretapping remain to be tried or heard on appeal. Thus, there is no reason for this Court to consider the question, especially in a case where the petitioner himself would not benefit from such consideration and in which the question was not decided below.

POINT II

Ianniello has failed to demonstrate that this Court has jurisdiction to review his contention that the prosecutor denied him due process in the grand jury. In any event, his contention does not warrant review by this Court.

A. Ianniello has failed to demonstrate that the Court has jurisdiction to review his due process claim.

In the instant petition, Ianniello renews his contention, rejected without comment by the Court of Appeals, that he was denied due process during his grand jury appearances because the prosecutors who questioned him did not, *sua sponte,* ''provide him with the text of his allegedly inter-

cepted telephone conversations as an aid to prompting his recollection of the events with regard to which he was questioned." Petition at 20. In responding to this contention before the Court of Appeals, the People again did not address its merits. Rather, the People argued only that the issue had not been preserved for appellate review.

Ianniello, the People pointed out, had been represented by an experienced attorney, William Sonenshine, Esq., when he appeared before the grand jury (A 70). He had been questioned about the substance of various conversations in which he allegedly participated, and some of them were read to him at length (A 41-42, 68). At no time during either of Ianniello's two grand jury appearances or during the week interval between them, had Ianniello or his attorney ever suggested to the grand jury or the prosecutor that Ianniello should have been shown the "text of his allegedly intercepted conversations" or that his recollection could have been better refreshed by a study of any such texts. The People asserted that this failure to make either a timely request or objection was fatal to Ianniello's belated attempt to litigate the issue on appeal.

The strength of the People's argument to the Court of Appeals is obvious. Ianniello failed to assert his claim at a time when relief might have been granted. Had Ianniello or his attorney made their contention known to the prosecutor at the time Ianniello was being questioned, there is no reason to believe that he would have been precluded from looking at those texts. Orderly process demanded that Ianniello be precluded from urging reversal on appeal on the basis of an alleged error that might so easily have been corrected at the appropriate time.

As with Ianniello's assertion that the trial court had improperly denied his motion for a post-trial hearing, the Court of Appeals rejected without comment his contention that he had been denied due process in the grand jury. Again, the remittitur of the court below is silent with respect to the basis of its decision. Thus, Ianniello has failed to meet his burden of showing that the decision of the court below was based on the federal claim he asserts here.

B. Ianniello's due process claim does not warrant review.

In the instant petition, Ianniello speculates that, had he been given an opportunity to study the transcript of recordings upon which he believed his questioners were basing their inquiries, he might not have been compelled to assert that a faulty memory prevented him from answering the questions put to him. Petition at 21. As we have said before, the prosecutor would doubtless have given Ianniello access to any such recordings or transcripts, if Ianniello had merely asked. The prosecutor wanted information from Ianniello and had granted him immunity in order to obtain it. As the jury's verdict indicates, Ianniello obviously did not wish to cooperate with the grand jury. There is no reason to believe that Ianniello's position would have changed had he been apprised of the text of intercepted telephone conversations. Indeed, when, during one of his grand jury appearances, an assistant district attorney asked Ianniello whether or not he remembered a certain conversation and then recited to Ianniello what appears to have been a verbatim account of that conversation, Ianniello responded, "Definitely not. Doesn't even sound like my phraseology." Appendix E of the Petition at 32a.

POINT III

Ianniello's other contentions do not present substantial federal questions.

A. The trial court properly denied Ianniello's motion for discovery of the "texts of his allegedly intercepted telephone conversations."

Six years after Ianniello's indictment and at the commencement of trial, Ianniello's counsel for the first time moved for discovery of the transcripts or recordings of Ianniello's conversations, about which he had been questioned in the grand jury (A134-36). Counsel contended that the discovery of such material was necessary in order to demonstrate that the prosecutor could have refreshed Ianniello's recollection in the grand jury by showing him those transcripts or playing for him any tape recordings of conversations. In support of this motion, counsel relied upon Rule 16 of the Federal Rules of Criminal Procedure and *United States* v. *Crisona*, 416 F.2d 107 (2d Cir. 1969), which interpreted the requirements of Rule 16 with respect to federal prosecutions. The trial court denied the motion (A153).

The denial of Ianniello's motion for discovery was an act of sound discretion. Clearly, the trial court was not bound by Federal Rule 16, or by the Second Circuit's interpretation of that rule in *Crisona*. Moreover, before Ianniello's trial, the New York Legislature had enacted discovery rules applicable to criminal trials in the state courts. N.Y.C.P.L. §240.20, L. 1970, c. 996. Section 240.20 expressly excluded from its scope "a statement made in the

course of an intercepted communication." Although section 240.20 did not become effective until September 1, 1971, several months after Ianniello's trial, the action of the trial court, in conformity with the legislative intent clearly expressed in its provisions, was certainly proper.

Finally, Ianniello was not in any way prejudiced by the denial of his motion. The indictment charged Ianniello with having given "evasive, equivocal, and false" responses in the grand jury. The sum and substance of the People's proof of that allegation was contained in the minutes of the grand jury proceedings. Thus, Ianniello had discovered the whole case against him when he had received a copy of the grand jury transcript years before his trial. Nothing was added to the People's case, or removed from Ianniello's defense, by the denial of his motion.

Ianniello now suggests that, had he been given transcripts or recordings of the conversations about which he had been questioned in the grand jury, he might have been able to demonstrate at trial that the prosecutors had inadequately refreshed his recollection during the questioning. Of course, whether or not the prosecutor adequately refreshed Ianniello's recollection was relevant to whether his faulty recollection was honest or contemptuous. However, the question for the jury's determination was not what the prosecutors *could* have done to refresh Ianniello's recollection but, rather, what the prosecutors had in fact done. And what the prosecutor had in fact done was contained in the grand jury minutes which Ianniello had well before the trial.

In these circumstances, the trial court's exercise of discretion, which was approved by the Court of Appeals without comment, does not raise a serious state question, much less a substantial federal question.

B. The prosecutor's summation was fair.

Ianniello, who isolates, out of context, portions of the prosecutor's summation, contends that the assistant district attorney deliberately commented on facts which were not in evidence. However, the prosecutor's comments were fair and clearly responsive to arguments raised in the defense's summation.

Throughout his summation, defense counsel repeatedly made reference to a purported deficiency in the People's proof which, he argued, was manifested by the absence of tape recordings of the conversations about which Ianniello was questioned in the grand jury (A257-58, 262-63, 270). In response, the assistant district attorney argued that, as a matter of practice, a prosecutor must do everything he can to refresh the recollection of a witness from whom he seeks truthful testimony (A292). To demonstrate that the prosecutors who had examined Ianniello before the grand jury had followed that practice, the assistant district attorney alluded to a portion of the grand jury minutes where the prosecutor asked Ianniello whether or not he remembered a particular conversation. The grand jury minutes, which were in evidence, indicate, by quotation marks, that the prosecutor then proceeded to quote both parties to the conversation. Appendix E of the Petition at 32n.

In referring to this portion of the grand jury record, the assistant district attorney initially said that Ianniello's

questioner had "read the entire transcript of the conversation" to Ianniello (A292). There was an objection, which the court sustained. The court told the jury that there had been "no proof of any transcript" (A292). Subsequently, the assistant, again referring to this portion of the record, said that the questioner had read "what *purported* to be a verbatim account of that conversation" (A305) (emphasis added). Defense again objected, and the objection was sustained. Finally, in a further effort to modify his characterization of this part of the evidence, the assistant said that Ianniello had been "given *in effect* a verbatim account of a conversation" (A307-08) (emphasis added). The court, referring to the quotation marks appearing in the record itself, permitted this characterization (A308).

None of these statements by the prosecutor was unfair, and none constituted a deliberate commenting upon facts not in evidence. Rather, the prosecutor was merely trying to characterize the evidence before the jury and, justifiably, to rebut the defense contentions that Ianniello had been unfairly questioned and that tape recorded evidence had been withheld from him. Certainly, Ianniello's claim that the summation was unfair, which was rejected without comment by the Court of Appeals, does not raise a substantial federal question.

Conclusion

The petition should be denied.

Respectfully submitted,

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